In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1766

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, ET AL., RESPONDENTS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

STATEMENT OF THE CASE

In documents filed May 24, 1974, the Special Prosecutor has asked this Court to grant certiorari before judgment in the Court of Appeals to review the decision of the District Court for the District of Columbia on May 20, 1974, denying the President's motion to quash a subpoena duces tecum. The Special Prosecutor further suggests to the Court that his brief be filed on June 7, 1974, and that the President file his brief on June 14, 1974, and requests that argument be heard "as soon after the filing of briefs as is consistent with the Court's calendar." The President opposes the petition for certiorari before judgment and he further opposes the suggestion for an expedited schedule.

REASON FOR DENYING THE WRIT

At page 9 of his Petition, the Special Prosecutor asserts that

> the constitutional issues involved in this case are exceedingly important, both in their own right and in the context of the litigation in which they arise. The case involves basic constitutional issues arising out of the doctrine of the separation of powers and the powers of the Judiciary and the prerogatives of the Chief Executive.

Of course, we agree with that characterization. But it is precisely because of the importance of these issues that the President opposes any attempt to shortcut the usual judicial process. Prompt judicial action is important in this case but "prompt judicial action does not mean unjudicial haste." *New York Times Co.* v. *United States,* 403 U.S. 713, 749 (1971) (Burger, C. J., dissenting). When a case raises the most fundamental issues of the allocation of power among the three branches of the federal government, it is more important that it be decided wisely than that it be decided hurriedly.

This is both a "great case" and a "hard case." If the unfortunate result of which Justice Holmes warned in a famous passage, *Northern Securities Co.* v. *United States,* 193 U.S. 197, 400–401 (1904), is to be avoided, it is imperative that this Court consider the case under those conditions that are essential to the judicial process at its best. This means that the Court must be assisted to the greatest possible extent by the lower courts and by counsel and that the Court must

have the opportunity for careful reflection and deliberation that wise decision requires.

> The indispensable condition for the discharge of the Court's responsibility is adequate time and ease of mind for research, reflection, and consultation in reaching a judgment, for critical review by colleagues when a draft opinion is prepared, and for clarification and revision in light of all that has gone before. [*Report of the Study Group on the Caseload of the Supreme Court* 1 (1972).]

Those conditions are hardly likely to exist in the closing days of a busy term, when the Court is already under grueling pressure to complete its action on difficult cases argued months before.

Attempts in the past by the Court to make a hurried disposition of an important case arising in the dying days of a term have not been among the proudest chapters in the history of the Court. *New York Times Co.* v. *United States,* 403 U.S. 713 (1971), is but the most recent example. Without commenting on the result in that case, it is hardly likely that any member of the Court found the conditions under which decision was made optimum or that the multiplicity of opinions that issued from the Court represent the best of which the Court was capable. What Justice Harlan said there, at 753, is applicable here as well:

> Due regard for the extraordinarily important and difficult questions involved in these litigations should have led the Court to shun such a precipitate timetable.

An earlier example were the cases of the war brides, *Reid* v. *Covert*, 351 U.S. 487 (1956), and *Kinsella* v. *Kruger*, 351 U.S. 470 (1956), although the pace there was less frenzied than what the Special Prosecutor apparently contemplates for the present case. In those cases review was granted on March 12th, oral argument was heard on May 3rd, and the decisions were announced on the last day of the term, June 11th. Even so, only a bare majority of the Court was prepared to rush to judgment. Justice Frankfurter reserved his vote, because the time had not been sufficient for adequate study and reflection. 351 U.S. at 485. Chief Justice Warren and Justices Black and Douglas announced that they would dissent but said "we need more time than is available in these closing days of the Term in which to write our dissenting views." 351 U.S. at 486.

The hasty decision in those cases bore bitter fruit. When the Court reconvened in the fall, it granted, on November 5, 1956, a petition for rehearing, and when the cases were finally decided on June 10, 1957, 354 U.S. 1 (1957), the Court, by a vote of six to two, accepted the constitutional proposition that it had rejected the preceding spring. Justice Harlan explained his change of vote:

> The petitions for rehearing which were filed last summer afforded an opportunity for a greater degree of reflection upon the difficult issues involved in these cases than, at least for me, was possible in the short interval between the argument and decision of the cases in the closing days of last Term. As a result I became satisfied that this court-martial jurisdiction

> could in any event not be sustained upon the reasoning of our prior opinion. [354 U.S. at 65.]

If a further example be needed, *A. L. A. Schecter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935), will serve as well as any. In *Schechter* certiorari was granted on April 15th, argument heard May 2nd and 3rd, and the decision announced on May 27th. History has long since pronounced its verdict on that unfortunate decision.

A case as important as the present one deserves better handling from this Court than was given the cases of the sick chickens, the war brides, or the Pentagon Papers. It is unreasonable to expect more from the Court, however, if it is asked to act under the conditions suggested by the Special Prosecutor.

Hasty decision is inappropriate in this case not only because of the importance of the issues involved but also because of their difficulty and their novelty. The issues raised in the Petition for Certiorari have never before been decided in this Court. Indeed the only precedents anywhere, which bear more than a remote analogy to what must be decided here, are the inconclusive rulings of Chief Justice Marshall sitting at circuit in the trial of Aaron Burr, *United States* v. *Burr,* 25 F. Cas. 187 (No. 14, 694) (C.C.D. Va. 1807), the decisions of the Court of Appeals for the District of Columbia Circuit in *Nixon* v. *Sirica,* 487 F. 2d 700 (D.C. Cir. 1973), and *Senate Select Committee* v. *Nixon,* No. 74–1258 (D.C. Cir., May 23, 1974), and the decision of the District Court that the Special Prosecutor is asking this Court to review.

Moreover, there are other substantial constitutional issues presently pending before the court of appeals in this proceeding concerning the district court's denial of the President's motions to expunge and for a protective order as well as the application of *Brady* v. *Maryland*, 373 U.S. 83 (1963) to privileged material not in the possession of the prosecution. Those issues, under seal by order of that court, are issues of first impression equally critical and significant to the outcome of the present litigation. Thus, it is even more imperative that all the issues involved in this proceeding receive careful consideration, reflection and deliberation at the intermediate appellate level prior to ultimate review by this Court.

This is not to underestimate the importance to the nation, and to the parties, of a prompt resolution of the present controversy to say that the urgency here is considerably less than in the steel seizure case, involving as it did the seizure of a basic industry in a time of war. However, the urgency of what is at issue here, the trial of persons charged with crimes, cannot be equated with the magnitude and irreparable effect to the Nation that was involved in the steel seizure case. Even under the more exigent conditions surrounding the steel seizure case, Justice Burton, speaking for himself and Justice Frankfurter, voted against bypassing the court of appeals.

> The constitutional issue which is the subject of the appeal deserves for its solution all of the wisdom that our judicial process makes available. The need for soundness in the result outweighs the need for speed in reaching it. The

> Nation is entitled to the substantial value inherent in an intermediate consideration of the issue by the Court of Appeals. Little time will be lost and none will be wasted in seeking it. The time taken will be available also for constructive consideration by the parties of their own positions and responsibilities. [*Youngstown Sheet & Tube Co.* v. *Sawyer*, 345 U.S. 937 (1952).]

All that Justice Burton wrote in that case is true here. There have been suggestions in the press that an opinion from the Court of Appeals would not be of benefit here because that court has already spoken on these issues in *Nixon* v. *Sirica*, 487 F. 2d 700 (D. C. Cir. 1973). Nevertheless it can only be of value to this Court to have the advantage of a decision by the Court of Appeals applying the rules it announced in the earlier case to the very different facts of the present case. The decision by the Court of Appeals last Thursday in the *Senate Select Committee* case—of which the District Court did not have the benefit when it made the order that it is sought to have reviewed here—shows that *Nixon* v. *Sirica* did not deal the death blow to executive privilege that some had imagined. The doctrine remains alive and well—and even if the limitations put on it in the *Sirica* case should ultimately be accepted as the law, the application of the doctrine as limited, is a sensitive question that requires hard judicial thinking. That thinking should be done in the first instance by the Court of Appeals. When the appropriate time comes, we shall of course argue to this Court that it ought not to ac-

cept the standard set out in *Nixon* v. *Sirica,* but on that issue—as on the other issues that will remain should we be unpersuasive on that point—it will be illuminating to see how the court that devised the *Sirica* standard thinks it applies to the present set of facts.

It should also be noted that there has been no assertion by either the defendants or the Special Prosecutor that the operation of the judicial process within the normal time frame would adversely affect the orderly administration of justice or the rights of the defendants in this case.[1] Thus, the purported need advanced by the Special Prosecutor for a hasty determination of the issues by avoiding the normal channels of appellate review is clearly outweighed by the actual need for a thorough and carefully considered review of the substantial constitutional issues involved in this litigation. In addition, it is at least questionable whether it is in the best interests of all parties involved to rush to judgment in this case in the midst of an impeachment inquiry involving intrinsically related matters.

Finally, the ability of counsel to assist the Court in the resolution of the issues in this case in such a short time frame is compounded by the concurrency of an impeachment inquiry in the Committee on the Judiciary, United States House of Representatives, which requires a full time effort by the President's Special Counsel and his staff.

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[1] In fact, on May 1, 1974, a motion with respect to *inter alia,* a continuance, was filed on behalf of defendant Ehrlichman. Defendant Haldeman moved the district court to adopt that request on the same date.

To allow the judicial process to run its orderly course will cause some delay, but though speedy justice in an important aim of the law it can never take precedence over just justice. "We all crave speedier judicial processes but when judges are pressured as in these cases the result is a parody of the judicial function." *New York Times Co.* v. *United States,* 403 U.S. 713, 752 (1971) (Burger, C. J., dissenting).

CONCLUSION

For all of the foregoing reasons the petition for certiorari before judgment ought to be denied.

Respectfully submitted,

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